FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No. [redacted] 471

THE CITY OF GREENWOOD, MISSISSIPPI,
Petitioner,

versus

WILLIE PEACOCK, ET AL.,
Respondents,

AND

THE CITY OF GREENWOOD, MISSISSIPPI,
Petitioner,

versus

DOROTHY WEATHERS, ET AL.,
Respondents

RESPONSE OF CROSS-APPLICANTS TO REQUEST BY CITY OF GREENWOOD FOR WRIT OF CERTIORARI

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LIST OF AUTHORITIES

LIST OF AUTHORITIES (Continued)

STATUTES

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NO. 649

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MAY IT PLEASE THE COURT:

PART I

The main thrust of the City's application is that this Court should revive and extend the outmoded cases of *Virginia vs. Rives* (1870) 100 US 313 25 L. Ed. 667 and *Kentucky vs. Powers* (1908) 201 US 1, 50 L. Ed. 633.

Cross-applicants' response is that these cases have been so seriously undermined that their demise should be pronounced. The intent of the Congress when it passed 28 USC 1443 (old R.S. Sec. 641) was clear. It was to afford the Negro the equal protection of the laws in a state criminal prosecution. The requirement of a jury selected without systematic exclusion of Negroes (and 12 cross-applicants are Negroes) has long been recognized as a matter of equal protection. *Strauder vs. West Virginia*, 100 US 303, *Ex parte Virginia*, 100 U. S. 339; *Neal vs. Delaware*, 103 U. S. 370; *Gibson vs. Mississippi*, 162 U. S. 565; *Carter vs. Texas*, 177 U. S. 442; *Rogers vs. Alabama*, 192 U. S. 226; *Martin vs. Texas*, 200 U. S. 316; *Norris vs. Alabama*, 294 U. S. 587; *Hale vs. Kentucky*, 303 U. S. 613; *Pierre vs. Louisiana*, 306 U. S. 354; *Smith vs. Texas*, 311 U. S. 128; *Hill vs. Texas*, 316 U. S. 400; *Akins vs. Texas*, 325 U. S. 398; *Patton vs. Mississippi;* 332 U. S. 463; *Cassell vs. Texas*, 339 U. S. 282; *Hernandez vs. Texas*, 347 U. S. 475; *Reece vs. Georgia*, 350 U. S. 85; *Eubanks vs. Louisiana*, 356 U. S. 585; *Arnold vs. North Carolina*, 376 U. S. 773.

While these cases have all resulted from procedural attacks in state courts on criminal proceedings not removed to the federal system, they serve as articulate reminders that for one hundred years criminal jury commissioners in the southern states have basically failed to reform the racially discriminatory character of their selection systems. The redactors of R.S. Sec. 641 were well aware of the problem of the newly-freed Negro in his attempt to find equal justice in the law courts of the old Confederacy. The entire theory of the civil rights removal statute was a recognition that until reform by the states eliminated racial segregation from their jury

selection systems the federal courts should provide the shelter of an honest forum for the persecuted class. The long overdue reform of the Southern system of criminal justice is only now beginning, and that persecuted class of one hundred years ago is still with us today.

In *Rives*[1] the Court recommended to the federal system the case-by-case method of reform that followed *Strauder*[2]. This method has not answered the question or advanced a reasonable solution. The Fifth Circuit on December 16th and 17th 1965 held an extraordinary en banc hearing covering seven jury discrimination cases. These cases were selected from all over the Circuit by virtue of their importance and their argument was in part designed to aid the court in a search for a solution to the mounting number of such cases. All actions pleaded the *Strauder* doctrine and all showed the consistency with which it has been violated in the Southern States.[3]

The *Rives* and *Powers* doctrine contained within it the seed of its own destruction for it virtually ignored the removal system which was designed to insure proper judicial administration of the problem. *Rives* fostered language that in itself qualified that case as one properly

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[1]100 U.S. 313 (1870)

[2]100 U.S. 303

[3]*U. S. ex rel Edgar Labat vs. Bennett*, Dkt. No. 22218,
U. S. Court of Appeals, Fifth Circuit.
U. S. ex rel Edward Davis vs. Davis, Dkt. No. 21926,
U. S. Court of Appeals, Fifth Circuit.
U. S. ex rel Andrew J. Scott vs. Walker, Dkt. No. 20814,
U. S. Court of Appeals, Fifth Circuit.
Willie Brooks vs. Beto, Dkt. No. 22809,
U. S. Court of Appeals, Fifth Circuit.
Joni Rabinowitz vs. U. S., Dkt. No. 21256,
U. S. Court of Appeals, Fifth Circuit.
Elisa Jackson, et al vs. U. S., Dkt. No. 21945,
U. S. Court of Appeals, Fifth Circuit.
Orsell Billingsley, Sr. vs. Clayton, Dkt. No. 22304,
U. S. Court of Appeals, Fifth Circuit.

a subject of removal, when it held that the right to remove should be directed to pre-trial infirmities. Judge Bell in his opinion below in this case comments as follows:

> "However this reasoning gives way to the fact that the illegality of a grand jury indictment springing from systematic exclusion *would* be susceptible of proof prior to trial." (emphasis added)

Further Judge Bell criticized this case[4] when it referred the jury selection question to the tender mercies of ex-Confederate State Judges;

> "The rationale was also advanced in these decisions that questions other than those arising from the terms of the statute should be left to the state courts for vindication. This does not follow for state courts are bound under the Federal Constitution to protect a litigant from the loss of rights even in the case of express language in a state statute."

The city saw this anamoly almost immediately for it states in its application on page 17 as follows:

> "Congress may have felt that this should be left to the state courts to correct. The opposite of this would seem to be true to petitioner; that is, that because the systematic exclusion question does go to the very heart of the state judicial processes it would seem more reason for Congress to have believed that one who has been so denied his constitutional right would be less likely to be able to enforce his rights in the courts of the state and therefore more in need of federal jurisdiction.

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[4]*Virginia vs. Rives*, Note 1, supra.

In this regard the recent case of *Dombrowski vs. Pfister*, 380 U. S. 479 (1965) clearly held that where federal rights are in danger from state action the proper function of the federal courts is to interpose the federal power between the individual citizen of the United States and the State.

> "When the statutes also have an over-broad sweep, as is here alleged, the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights. The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases. See *Baggett vs. Bullitt*, supra, at 379. For '[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions . . . ' *NAACP vs. Button*, 371 U. S. 415, 433."[5]

The free speech First Amendment rights referred to in the *Dombrowski* opinions quoted above are no more precious and are no more federal in character than the Thirteenth, Fourteenth and Fifteenth Amendment rights made available for special protection by the civil rights removal statute. Title 28, §1443, does not allow the removal of all or even most criminal cases, and the jury selection interpretation sought here does not encompass procedural

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[5]See also dissenting opinion of Judge Wisdom in an earlier opinion in this case found at 227 F. Supp. 556 (1964) wherein he wrote: "Once more I emphasize that the basic error in the court's decision is its failure to distinguish between the type case now before it and the run of the mine suit by a criminal offender asking for relief against unlawful State action. In the Civil Rights Act Congress established a distinct federal cause of action in favor of those whose constitutional rights have been invaded. 42 U.S.C.A. §§1981, 1983, 1985. As a matter of law, since such cases involve a federal question, the right existed anyway. The fact that such cases involve a dispute over federally protected freedoms makes the federal court the appropriate forum for settlement of the dispute."

evils in jury selection which do not touch on the equal protection guarantees of the wartime amendments. Those amendments had one great aim — to bring the Negro up to the level of the white man and to use federal power to see that this was accomplished. This was why federal removal was vital to the true implementation of these amendments.

Here the cross-appllicants seek, as did the Freedmens Bureau one hundred years ago, to raise the Negro up, to give him the vote and the education to use it. For this they were exposed to the wrath of the white Mississippi community which, (as Louisiana did in *Dombrowski)*, promptly set into motion the machinery of the state to suppress them. As stated by Judge Wisdom in his District Court dissenting opinion in that case:

> "Chairman Pfister is quoted as saying that the plaintiffs were racial agitators. If that is true, and if the plaintiffs' modest agitation by mail was motivated only by the plaintiffs' interest in civil rights for Negroes, then once again, as in *Bush vs. Orleans Parish School Board*, the State has 'marshalled the full force of its criminal law to enforce its social philosophy through the policeman's club.' Under any rational concept of federalism the federal district court has the primary responsibility and the duty to determine whether a state court proceeding is or is not a disguised effort to maintain the State's unyielding policy of segregation at the expense of the individual citizen's federally guaranteed rights and freedoms."[6]

Rives and *Powers* reflect no more than the removal

[6] *Dombrowski vs. Pfister*, 227 F. Supp. at p. 562.

counterpart of *Plessey vs. Ferguson*[7]. These ancient removal cases are judicial reflections of the Hayes-Tilden compromise withdrawing the previously given federal support of the Negro. This withdrawal was first signalled in the *Slaughterhouse* cases,[8] and consistently followed for seventy-five years. It was finally given its death blow in *Brown vs. Board of Education*[9]. *Rives* and *Powers* deserve the same fate.

Not only were these two removal cases historically wrong to begin with and now hopelessly out of date, but their reasoning is completely deficient as clearly set forth by the city itself in its application to this court where on page 16 it says:

> "Furthermore, City submits that there is no more reason for Congress to have believed that one would be denied his equal civil rights in the courts of the state because state officials allegedly arrested and charged him in violation of the equal protection clause than if state officials discriminated against him in violation of the equal protection clause in the selection of the grand and/or petit jurors."

Applicants would turn this argument on its head and say that there is *as much reason* for Congress to have believed that one would be denied his "equal civil rights" by a system of racially discriminatory jury selection as by a racially motivated arrest and charge.

Clearly, Judge Bell, below, is hard put to follow the reasoning of *Rives* and *Powers*. He simply did the best pos-

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[7] 163 US 537, 41 L. Ed. 256, 16 S. Ct. 1138 (1896).
[8] 16 Wall; 36, 21 L. Ed. 394. (1873)
[9] 347 US 483, 98 L. Ed. 873, 74 St. Ct. 686. (1954)

sible job on this point while recognizing the inappropraiteness of his Circuit Court's attempting to strike them down.

Judicial administration in that circuit has been sorely tried by the obstructionist effect of these *Plessy* type opinions. Clearly Negroes' rights are more effectively protected and the judicial process more properly and efficently used if the equal protection problems posed by racially discriminatory jury selection systems are avoided in the first instance by the simple process of federal removal rather than by being dragged through the federal courts for years by the habeas corpus — appeal — certiorari method. Certainly the Fifth Circuit in its recent *en banc* hearing was searching for something along these lines. Only this court can ultimately restore this vital federal right of equal protection in jury selection to the Negro people in an effective and efficient way. *Powers* and *Rives* should be overruled.

PART II

Although the most vital point of this response is directed toward equal protection in the jury selection system (such being at least approached by an historically correct application of the civil rights removal statute), there are other considerations:

A. One of these is raised on page 19 of the city's application when it says that all sorts of cases can now be removed under the present state of *Peacock* at great expense to small municipal units such as Greenwood. The obvious answer to this is that most, if not all, of these defendants should not have been charged in the first place. If small Mississippi farming communities (where a large part of the population of that state lives) choose to misuse

the power and funds of municipal and county government to arrest and jail large numbers of their own local citizens and their friends who peacefully protest racial segregation and ask for the right to vote, then that is their concern, but such compaints cannot be utilized to ask relief from a federal court charged with the protection of federal rights. Finally, on this point, the fear as stated by the city is obviously exaggerated. These removals are for the purpose of equal protection of the laws, not harassment or even due process reasons.[10]

B. This is, however, not the real problem. Judge Bell, below, did not couch his opinion in this case on the arresting and charging process alone and isolate *Rives* and *Powers* without good cause. His was probably a two-fold reason. *Rives* and *Powers* were a final problem for this court, not his own, and he recognized the realities and meanings of the arresting and charging process in Mississippi in the Civil Rights Summer of 1964, where an almost semi-feudal, rural society was confronted with a realization of what life in Twentieth Century America required.

C. This is not the only removal case arising in Mississippi out of that experience. The decision of this Court and of the Circuit there attest to that. Besides the many *Dombrowski* type prosecutions such as this still pending

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[10]As previously stated the removal statute does not encompass Federal Jurisdiction on other than equal protection grounds. Philosophically the concepts of equal protection and due process may well meet at many points (see *Thiel vs. Southern Pacific Co.*, 328 U.S. 217, 66 S. Ct. 984 (1946) Historically, however, and as a matter of law, these are treated separately.

in the Court of Appeals below,[11] there are several cases that reach the real, historic *Rives* situation. For example, Negro Civil Rights workers who, acting by example and individually, sought to register as voters, and who allegedly, with knowledge or by accident, failed to state a record of previous conviction, and are then charged with perjury.[12]

Unless the Court of Appeals for the Fifth Circuit or this Court in this or in another case, enlarges upon the application and meaning of 28 USC § 1443(2) relative to who acts under "color of law,"[13] then these defendants who

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[11] *Rev. John Collins, et al vs. City of Jackson*, U. S. Court of Appeals for the Fifth Circuit, Docket No. 21538.

Rev. John Collins, et al vs. City of Jackson, U. S. Court of Appeals for the Fifth Circuit, Docket No. 21538.

Stephen Miller, et al vs. State of Mississippi, U. S. Court of Appeals for the Fifth Circuit, Docket No. 22403.

Stokely Carmichael vs. City of Greenwood, U. S. Court of Appeals for the Fifth Circuit, Docket No. 22289.

Landy McNair vs. City of Drew, U. S. Circuit Court of Appeals for the Fifth Circuit, Docket No. 22288.

Frank Calhoun vs. City of Meridian, U. S. Court of Appeals for the Fifth Circuit, Docket No. 21991.

Ben Hartfield, et al vs. State of Mississippi, U. S. Court of Appeals for the Fifth Circuit, Docket No. 21811.

Shirley Anderson, et al vs. State of Mississippi, U. S. Court of Appeals for the Fifth Circuit, Docket No. 21813.

State of Mississippi vs. Milton Hart Hancock, Charles Edward Glenn, et al, U. S. Court of Appeals for the Fifht Circuit, Docket No. 22665.

Sheldon Trapp, et al vs. State of Mississippi, U. S. Court of Appeals for the Fifth Circuit, Docket No. 22196.

Rupert Crawford, et al vs. State of Mississippi, U. S. Court of Appeals for the Fifth Circuit, Docket No. 22382.

[12] *Hancock, et al vs. State of Mississippi*, (1964) _____ F. Supp. _____, Docket No. _____. U. S. D. C. So. Dist. Miss.

[13] The lower court opinion restricts this to Federal Officers who act pursuant to their charge and oath and others of a quasi-official capacity. (This point is covered and opposed in the cross-application heretofore filed). If one concedes that *Rives* and *Powers* are correct then those accused of perjury in Part C above can only fall into the category of § 1443(2) and contrary to Judge Bell's opinion (on page 15 script opinion)the sweep of sub-paragraph 2) would not include such persons. Thus persons obviously extended protection by original RS 641 are excluded by the opinion below in this case, and by *New York vs. Calamison* 342 F. 2d 255 (1965).

occupy the precise position of the Freedmen of 1865, will absolutely depend upon the fair-mindfulness of the all-white, segregationist jury which tries them for protection of their rights under the Federal Constitution.[14] They in all likelihood cannot remove under the present state of *Peacock*.

D. The historical realities and exigencies of the Mississippi situation can be bluntly stated. The effort and response in 1964 came even closer than one would expect in the mid-Twentieth Century, to the actual conditions that gave rise to the Civil Rights Acts of 1866, 1868 and 1875. While this Court cannot repeat history, it can prepare its response with knowledge of the effort and work of the Congresses of those years. This Court has before now given appropriate response to vital aspects, of the great social problems brought before it.[15]

It is therefore urged that review of this case, the overruling of judicial roadblocks such as *Rives* and *Powers* and the application of appropriate judicial administration such as was exercised in *Hamm*[16], would be required and ap-

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[14]Rural Southern juries have not been known in recent times to exhibit an absolutely fair and impairtial response to somewhat convincing evidence of guilt or innocence, cf. New York Times Reports of *Ala. vs. Collins*, (Luizzo Case) (Ala.), *Ga. v.* _____ (Penn Case) (Ga.), *Ala. vs.* _____ (Reeb case) (Ala.) *State of Mississippi vs. de la Beckwith* (Evers case) (Mississippi).

[15]Almost all basic social problems of the United States eventually find their legal translation, and many of these in this Court. See Hofstadter, *Age of Reform*, pages 309-10 (Knopf, 1959), see *Marbury vs. Madison* (1803) Cranch 137, 2 L. Ed. 60 on Judicial Supremacy Re; *Dred Scott* on Chattel Slavery; *Munn vs. Illinois* (1877) 94 U. S. 113 24 L. Ed. 77, on substantive due process and price control.

[16]*Hamm vs. Rock Hill* (1964), 379 US 603, 85 S. Ct. 384, 13 L. Ed. 2d 300.

propriate in this instance.

Respectfully submitted,

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CERTIFICATE

I hereby certify that a copy of the foregoing Response of Cross-Applicants to Request by City of Greenwood for Writ of Certiorari has been mailed to Mr. Aubrey H. Bell, of Bell and McBee, 115 Howard Street, Greenwood, Mississippi and Mr. Hardy Lott of Lott and Sanders, 226 Aven Building, Greenwood, Mississippi, this _____ day of _____, 1966.

_____

Benjamin E. Smith